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IN THE

Supreme Court of the United States

October Term, 1969

No. 135

FREDERICK WALZ,
Plaintiff-Appellant,
against

TAX COMMISSION OF THE CITY OF NEW YORK,
Defendant-Respondent.

BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, *amicus curiae*

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All parties have consented in writing to the filing of this brief.

The interest of the National Council of Churches is the direct consequence of the nature of its corporate commitments and of the issue here involved.

The National Council is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-three Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the

United States. It is organized exclusively for religious purposes. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

On May 2, 1969, the General Board of the National Council adopted the following as part of its Policy Statement entitled "Tax Exemption of Churches":

> "2. *Tax exemption can be a safeguard of the free exercise of religion.* In the United States, it has been a basic public policy since the founding of the nation to accord to freedom of religion, speech, press and assembly a 'preferred position' at the head of the Bill of Rights. Christians support and affirm this healthful arrangement of the civil order, not solely or primarily for themselves and their churches, but for everyone. Citizens, whatever their beliefs, should likewise appreciate the policy of our society that the free exercise of religion cannot be licensed or taxed by government. Property or income of religious bodies that is genuinely necessary (rather than merely advantageous) to the free exercise of religion should likewise not be taxed. Except for cases where exemption is required to afford equality with other eleemosynary institutions, such exemption should be confined to the essential facilities of the church and to the voluntary contributions of the faithful for the operation of the religious organization."

Obviously, this Statement relates itself to the heart of:

The Question Here Presented

Is the tax exemption granted by Article 16, Section 1, of the New York State Constitution and by Section 420, sub. 1 of the New York Property Tax Law unconstitutional insofar as they (quoting the Tax Law) grant tax exemption for real property owned by a corporation "organized exclusively for religious purposes and used exclusively for carrying out thereupon one or more of such purposes."

The appellant's Jurisdiction Statement thus posed the issue:

> "The appellee, as authorized by Sec. 420, subd. 1 of the Real Property Tax Law and Article 16, Sec. 1 of the New York state constitution, regularly grants exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes.
>
> "In the complaint, and in the subsequent appeals, appellant contended that the aforesaid exemption violates the first and fourteenth amendments of the federal constitution."

The Complaint

The complaint alleges that the plaintiff pays taxes on a plot of land on Staten Island, and that the tax exemption under New York law of religious property used exclusively for religious purposes deprives him of his constitutional "right of religious freedom" and confiscates his property without due process of law.

POINT ONE

The Free Exercise Clause in the First Amendment forbids taxation by the Federal or State governments of houses of worship or of other religious property used exclusively for religious purposes and owned by corporations organized exclusively for religious purposes.

(1) From the earliest times an edifice for Jewish or Christian religious observances has been authoritatively declared as an "House of Prayer for all Peoples." (Isaiah c. 56, v. 7; Luke c. 19, v. 46.) It is in itself a symbol and a part of the religion to which it is dedicated.

State taxation of the sanctuary would be state taxation of the exercise of the religion which centers in it. Thus, it would be taxation of the exercise of a right expressly recognized by the Bill of Rights, and by it guaranteed to be free. In effect it would be state taxation of prayer in the "House of Prayer."

Not since the ordainment of our Constitution has any such tax been imposed by Congress or by any legislature.

In his historic reply to the Danbury Baptist Association, quoted in *Reynolds* v. *United States*, 98 U.S. 145 (1878), Thomas Jefferson said (p. 164):

> "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."

To this statement by Jefferson the Supreme Court added the comment (p. 164):

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."

And in *Everson* v. *Board of Education*, Mr. Justice Rutledge quotes James Madison as saying "there is not a shadow of right in the general government to intermeddle with religion," and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." (330 U.S. 1, 38, 39.)

Thus, as Jefferson emphasized, the "Free Exercise Clause," no less than the "Establishment Clause," builds and renders secure the "Wall of Separation." Neither the State nor the House of Worship can practice exaction from the other.

(2) The Religious Corporations Law of New York, Section 2, defines a "religious corporation" as "a corporation created for religious purposes," and defines an "incorporated church" as "a religious corporation created to enable its members to meet for divine worship or other religious observances."

The appellant is, in effect, claiming that the fulfillment by such a corporation of its chartered purpose to establish, own and conduct a place for "its members to meet for divine worship" under the protection of the Bill of Rights in both the state and federal constitutions, nevertheless subjects such place to taxation by the nation, state and

locality, and to sale and termination by the secular government in the event of non-payment of the tax.

In paragraph Eighth of his complaint the plaintiff alleges that, although he is "a Christian" he is "not a member of any religious organization as referred to herein, rejecting them as hostile." But religious hostility between Christians is within the very subject which the Free Exercise Clause was intended to exclude from any form of State participation. The government is neutral as between religious opinions and "disparages none." (*Abington School District* v. *Schempp*, 374 U.S. 203, 215 [1963].)

Separation of Church and State, if it is to be meaningful at all, must be bilateral and reciprocal. Neither is to take from the other. Tax exemption of houses of worship is essential to such Separation and is indeed necessitated precisely because of the Free Exercise Clause.

For secular tax assessors, with various personal religious adherences or hostilities, to enter the house of worship professedly to assess for secular tax purposes and enforcement the interior, the altar, its furnishings, the pulpit, the lectern, the baptismal font, the memorial windows, and the other embodiments and exercises of the church's religious faith, would entail intolerable indignity and conflict as to standards and opinions of value.

Latent, and easily ready to surface, would be questions and suspicions of preference of one sect or religious body over another, of the presence of hostility to the particular religious body or to all religion, and of the vast differences between secular and religious values.

The state's power to tax entails the state's power to enforce by seizure and sale, commonly by public auction on the location. "How much am I bid for this church building, or this altar?" In short, the power to substitute the Auction Block for the House of Prayer! The Pandora's Box, which the First Amendment locked, would be unlidded.

(3) This Court has repeatedly noted and emphasized that the rights enumerated in and guaranteed by the First Amendment command "a preferred position" in the Bill of Rights, and that, among such preferred rights, the first in order is the guarantee of the separation of church and state.

The source of this eminence is the historic truth recognized repeatedly by this Court from the earliest times that "this is a religious people" and that "no purpose of action against religion can be imputed to any legislation" (*Holy Trinity Church* v. *United States,* 143 U.S. 457, 465 [1892]). "We are a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson,* 343 U.S. 306, 313-4 [1952]). "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind" (*Abington School District* v. *Schempp,* 374 U.S. 203, 226 [1963]).

As regards the State, religion is inviolable.

(4) A decision in point *a fortiori* is *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

There, in the exercise of its police power the city of Jeannette, Pennsylvania, enacted an ordinance that "all

persons canvassing for or soliciting orders for goods, paintings, pictures, wares or merchandise of any kind" should be required to obtain a license. The obvious purpose of the ordinance was to protect the householder from the dangers in opening doors to promiscuous would-be vendors or solicitors. Jehovah's Witnesses challenged as unconstitutional the *application* of the ordinance to their going about from door to door distributing their religious literature, soliciting purchases of their religious books, and using a phonograph to voice to the householder their religious views. None applied for a license. Their convictions were sustained by the Pennsylvania courts but were reversed by this Court with an opinion written by Mr. Justice Douglas which was at pains to say (p. 110) that the single issue was "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." In holding that the Free Exercise Clause constituted an overriding exception to the application of the ordinance to such religious colporteurs, this Court said (p. 113):

> "It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. * * * The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

And again (p. 112):

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano*

Co. v. *Hamilton,* 292 U.S. 40, 44-45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."

The taxation of church edifices used exclusively for religious purposes would even more obviously be "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights," or, to put it more emphatically, on a right older than the Bill of Rights and guaranteed by it.

Obviously also the taxation of church edifices could close their doors or cause them to be sold, or prevent their erection where those seeking this exercise of their religion "do not have a full purse." The House of Worship would cease to be a House of Prayer attainable by all people and would be attainable (if at all) only where there were sufficient "resources necessary for its maintence." Even for those with resources, taxation could restrict and forbid the free exercise of religious observances and activities. The employment of adequate or acceptable pastoral leadership could be jeopardized or inhibited. Yet the poor's free heritage in religion has always been deemed and proclaimed one of religion's greatest glories (Isaiah, c. 29, v. 19; Matthew, c. 11, v. 5). The poor as well as the rich are entitled to full and equal religious freedom and the privi-

leges and means of its exercise. They are not to be dependents of, and second class members in, the congregations of the rich.

Also worthy of quoting from the *Murdock* case is the following (p. 115):

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, *freedom of religion are in a preferred position.*" (Italics are ours.)

Equally so this taxation of church edifices "does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with" all real estate.

Contemporaneous with the decision of this Court in this *Murdock* case was its decision in *Jones* v. *Opelika,* 319 U.S. 103 (1943) where the issues "were of the same character."

Also the *Murdock* decision was later reaffirmed by this Court in *Follett* v. *McCormick,* 321 U.S. 573 (1944). There the town of McCormick, South Carolina, had an ordinance similar to that in the *Murdock* case. The appellant before this Court was a resident of McCormick and an ordained minister of the Jehovah's Witnesses. "He obtained his living from the money received" by going from house to

house distributing and selling religious books. He had no other source of income. The state court had distinguished his case from the *Murdock* and *Opelika* decisions on the ground that Follett was not an itinerant but was a resident of the town and was making his living by selling books from door to door. Because of the Free Exercise Clause this Court nevertheless reversed the conviction on the ground that these distinctions were not valid in constitutional consequence. To quote (pp. 576-7):

> "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. *The priest or preacher is as fully protected in his function as the parishioners are in their worship.* A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245-248." (Italics are ours.)

(5) These decisions, we submit, go well beyond what is necessary for the decision of the present case.

The ordinances there involved were well within the police power of the municipality for the safety of its residents and their property. They were secular in their wording and expressed no discrimination for or against any religious activity. Nevertheless, this Court held that their *application* to the described particular religious activities, although similar to merchandising and pecuniary

in character, was proscribed by the Free Exercise Clause. This Court expressly interpreted that Clause as extending to such activities the same protective exemption from taxation as it expressly took for granted and declared applicable to "worship," the assembling for worship, and the preaching of "sermons" in established houses of prayer.

In his concurring opinion in the *Follett* case Mr. Justice Murphy said (321 U.S. 573, 579):

> "We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.
>
> "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."

In his opinion in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), Mr. Justice Frankfurter said (pp. 462-3) of the *Murdock, Opelika* and *Follett* decisions that they rejected as unconstitutional the application of the levy imposed by the ordinances to "an activity which in the light of history could reasonably be viewed as *sacramental.*" (Italics ours.) Even more so must a levy upon a house of worship and the ground upon which it stands be viewed as an unconstitutional levy imposed upon "an activity which

in the light of history could reasonably be viewed as sacramental." What could be viewed more so?

(6) Houses for the assembly of people to worship and to hear the Gospel of their religious faith are essential to the free exercise of the religious belief of all the principal religious communions. The Founders themselves were participants in the religious "meeting houses."

For the State to tax such religious houses and the ground which furnishes their foundation is in essence to tax the religion of which they are an essential part and an evangelistic expression and exercise.

A church or temple is in itself a proclamation of religious faith and conviction, an act and manifestation of evangelism, and an invitation and exhortation to all to give place in their lives to religious belief and the exercise thereof. In its very presence in the community the church or temple is as symbolic and potent a public exercise and proclamation of religion as is the display of the flag of our country a symbolic and potent public exercise and proclamation of its constitutional ideals.

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), South Carolina's Unemployment Compensation Act denied eligibility for its benefits if, without good cause, the claimant had refused to accept available suitable work when offered him. Sherbert, a member of the Seventh Day Adventist Church, refused to work on Saturday, the Sabbath Day of her faith. Because of this refusal her employer discharged her. The state commission and the state court denied her application for unemployment compensation. This Court

reversed on the ground that the state's denial of her eligibility violated her constitutional rights under the Free Exercise Clause. To quote (pp. 404-5):

> "The ruling (below) forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. * * * It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *American Communications Assn.* v. *Douds*, 339 U.S. 382, 390; *Wieman* v. *Updegraff*, 344 U.S. 183, 191-192; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155-156."

The special pertinency of this case is in the fact that this Court held irrelevant as against Sherbert's right to the exercise of her religious belief the claim of South Carolina that its legislation neither contained nor expressed anything anti-religious, and that it was merely non-discriminatory social regulation of a subject of general application "within the State's constitutional power to regulate" (p. 403). This Court's decision had the obvious secular effect (evidently deemed by it to be irrelevant) that the taxpayers of the state were required to provide Sherbert with unemployment benefits which, but for her religious scruple, would not be due her.

In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), this Court said (pp. 493-4):

> "We are all agreed that the First and Fourteenth Amendments have a secular reach far more pene-

trating in the conduct of Government than merely to forbid an 'established church.' * * * We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' "

Essential to that "complete separation" is the exemption of the house of worship from all efforts by the state to exact money from it,—efforts which, if permissible, would have the consequence of power in the state to encumber, terminate or alienate it and dispossess the worshippers, if such exactions are not punctually paid in full or cannot be.

POINT TWO

The decisions cited by the appellant have no bearing on the actual issue here.

(1) The appellant's brief neither quotes nor discusses the Free Exercise Clause.

Its argument proceeds as if that exalted and comprehensive Clause were not in the Constitution at all. It bases itself solely on decisions concerning legislation appropriating public funds for the support or aid of religious activities, beliefs or institutions. Those decisions relate themselves to the Establishment Clause.

But here no state appropriation of state moneys is at issue. Hence to argue from such decisions is the spinning of irrelevance and a *non sequitur*.

Appellant's argument reduces itself to the ultimate proposition that, if the state taxes any class of real prop-

erty, it is constitutionally compelled to tax the house of worship.

The freedom of the house of worship from taxation is not a violation but a protection of the First Amendment and of a basic bulwark of our freedom.

The First Amendment is in perfect balance. It forbids the State to give to or take from the Church.

The opening of a door for any such compulsory takings by the State would be the beginning of the end of the whole constitutional concept of the Separation of Church and State. The moment the State enters the Church to take for itself money or property given, acquired and held exclusively for the Church's religious purposes therein, the freedom of the Church from intermeddling by the State is lost.

(2) According to the same argument as is used by appellant here, a State is constitutionally compelled to include in its *personal property tax* the cross, the chalice, the seven-branched candlestick, and the Holy Bible in the chancel. It must interest itself in the value of the baptismal font and the memorial windows. It must sit with the Church's representative while the money in the collection plate is being counted. It must demand and exact its "cut."

To quote again from the opinion of this Court in the foregoing *Murdock* case (319 U.S. 105, 112):

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

The Free Exercise of Religion is a corollary from the Freedom of Conscience. Hence it is much more than a "privilege." It is a fundamental personal and constitutional "right,"—*the very highest.*

(3) The Church is not a creature or permittee of the State. It does not derive its authority from the State.

The Church is older than the State,—indeed as old as Man.

As said by this Court in *Engel* v. *Vitale,* 370 U.S. 421, 434 (1962):

> "The history of man is inseparable from the history of religion. And * * * since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'"

Thus, the position of the Church in our society is unique, and the constitutional wall of separation between the State and the Church is also unique—no other institution (including, for example, the Press) is thus excluded by fundamental law from grants of public funds. But the Framers were as fair as they were wise—the Establishment Clause forbids the flow of tax funds to the Church, while the Free Exercise Clause forbids the exaction of taxes from the Church.

As Madison wrote of Church and State (quoted at 330 U.S. p. 40):

> "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between

them, will best be guarded agst. by an entire abstinence of the Govt. from interference *in any way whatever*, beyond the necessity of preserving public order, & protecting each sect agst. trespasse on its legal rights by others." (Emphasis supplied.)

In *Thomas* v. *Collins*, 323 U.S. 516 (1944), this Court emphasized (p. 530) "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," and then said (p. 530):

> "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."

Note: This brief's discussion of the Free Exercise Clause is not intended as disagreement with or disparagement of the discussion in other defense briefs of the Establishment Clause.

Conclusion

The disposition by the courts below should be affirmed.

Respectfully submitted,

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